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No. 8[redacted]4 55

To be argued by
MAX R. SIMON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

MAX M. LESSER,

Plaintiff-Appellee,

against

SERTNER'S INC., MURRAY SERTNER and PAUL SERTNER, trading as RENOFAB PRODUCTS COMPANY,

Defendants-Appellants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MAX R. SIMON,
Attorney for Plaintiff-Appellee.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Your petitioner, Max M. Lesser, respectfully prays that a writ of certiorari issue to review the judgment and mandate of the Circuit Court of Appeals for the Second Circuit, entered in the above case on February 18, 1948, which reversed a judgment in petitioner's favor and directed a dismissal of his complaint.

Opinions Below

The opinion of the District Court (R. 461-471) is reported at 76 F. Supp. 144.

The opinion of the Circuit Court of Appeals (R. 494-500) is reported at 166 F. (2d) 471.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 18, 1948 (R. 501). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

The sole question at issue here is whether an industrial and factory enterprise, such as respondent, conducting a completely integrated wholesale and retail business, and also engaged in regularly producing goods for interstate commerce, is entitled to immunity from the provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Secs. 201 *et seq.*) by virtue of the exemption contained in Section 13 (a) (2), 29 U. S. C. A. Sec. 213 (a)(2).

Statute Involved

The pertinent provisions of the Act involved here are Sections 7, and 13(a), Subdivision (2).

Section 7 provides:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, un-

less such an employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 13 (a), Subdivision (2), provides as follows:

"The provisions of sections 6 and 7 shall not apply with respect to (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

Facts

Both courts below concurred in the conclusion that petitioner, during the course of his employment herein, was an employee engaged in commerce within the purview of Section 7 of the Act, and was, therefore, entitled to its benefits. The reasons therefor are fully set forth in both of the opinions below. This question, however, is not at issue here.

This petition concerns itself solely with the conclusion of the Circuit Court of Appeals that respondent was a "retail or service establishment" and, therefore, entitled to the exemption contained in Section 13 (a)(2) of the Act.

All the pertinent facts regarding the nature and character of the business carried on by the respondent have been fully set forth in the uncontested findings of the Trial Court (R. 472-481). They are as follows:

1. Plaintiff, Max M. Lesser, was employed by the defendant, Sertner's Inc., a domestic corporation, from the 2nd day of January, 1940 to March 17th, 1944.

2. During the aforementioned period, said defendant was engaged in the business of cleaning, processing, renovating,

repairing, etc. of upholstered furniture, draperies, curtains, rugs and carpets.

3. During the aforementioned period, the said defendant was located on, and occupied, the entire twelfth floor (about 125 feet in length) of a loft building, located at 305 E. 63rd Street in the Borough of Manhattan, City and State of New York, which is a factory neighborhood.

4. The stockholders of said defendant corporation were the individuals Murray Sertner and Paul Sertner, who were, respectively, the Secretary-Treasurer and President of said defendant corporation.

5. During the period of his employment herein, plaintiff was employed by the defendant, Sertner's, Inc., as the receiving and shipping clerk and his duties were to take care of and assist in the receiving and shipping of all the merchandise that came in and went out of the premises of the defendant, Sertner's, Inc.; to physically handle, package, assort, route, wrap and unwrap said merchandise; to pack and label boxes, bags and curtains; and to load and unload trucks. He also cleaned furniture, especially after March 5, 1943.

6. During the aforementioned period, the defendant, Sertner's, Inc., was operating its premises in the nature of a full-fledged factory, with its employees engaged in various physical and mechanical operations, such as shipping, receiving, pressing, finishing, bagging of curtains, cleaning of furniture, etc. Said defendant also employed on its premises a female clerical employee, engaged in doing its clerical work and bookkeeping.

7. During the aforementioned period, the ultimate consumer, whose goods were cleaned and processed by this defendant, rarely came into this defendant's premises.

8. During the period at issue, this defendant operated trucks which it used to pick up and deliver all the goods worked on, processed and physically handled by it.

9. This defendant did not possess the necessary furniture, equipment and decorative accessories, nor did it attempt to set up its premises in such fashion as to attract the patronage of the general consuming public. Its business was not procured in this manner; nor, unlike the typical local, neighborhood or corner retail establishment, was it seeking this type of business. The defendant procured no business from strangers off the street who happened to be walking by its premises, nor was it so located or equipped as to handle this type of business. The defendant didn't do any over the counter business with the ultimate consumers.

10. During the period of plaintiff's employment herein, over 90% of the business done by the defendant was charged to the credit of its customers. Less than 10% of the total business done by the defendant was in the nature of C.O.D. transactions (*i.e.* with payment required to be made upon delivery of the goods).

11. Approximately one-third of defendant's total business was procured from and through interior decorators, who recommended their customers or clients to the defendant. The defendant constantly advertised to, and actively solicited the assistance of, interior decorators for business; and paid these interior decorators a commission of approximately 10% on all business obtained from and through them. In such cases the ultimate consumer was considered, both by the defendant and by the interior decorators, as the client or customer of the interior decorators and not that of the defendant. Repeatedly, in its advertising to interior decorators, the defendant referred to the ultimate consumer as the client of the decorator, and

in the correspondence from the interior decorator to the defendant, the interior decorator referred to the ultimate consumer as "my" client.

12. The defendant employed no inside sales clerks on its premises to wait on trade, nor was it the duty or function of any of the other employees of the defendant to wait on trade.

12. (a) Out of an approximate total of twenty employees, defendant employed never less, and sometimes more, than four outside salesmen whose duties it was to go out and solicit busines for it.

13. Defendant did not possess a selling counter, or a cash register to ring up sales, or shelves for the display and convenient arrangement of merchandise, or display windows to attract the patronage of the general public.

14. Defendant maintained on its premises various mechanical equipment used by it in the operation of its business.

15. The customers, for whom the defendant regularly did work or whose goods were so processed by the defendant, resided, or were located, in the five boroughs of the City of New York (*i.e.* Bronx, Manhattan, Queens, Brooklyn and Richmond), in Westchester County, as far north as Harrison, New York, in Nassau and Suffolk Counties (Long Island), in Connecticut and New Jersey.

16. During the entire period of plaintiff's employment, defendant regularly and continuously processed and physically worked on goods belonging to furniture dealers, trade shops and interior decorators. A furniture dealer is a manufacturer or distributor of furniture. A trade shop is a manufacturer or distributor of curtains, drapes, upholstered furniture, slipcovers, rugs and carpets. The

goods so worked on and physically handled by the defendant were, in turn, sold in commerce to third parties by said furniture dealers, trade shops and interior decorators.

17. During the entire period at isue here, the defendant regularly and continuously processed and physically worked on goods belonging to department store and other business, industrial and commercial users, such as hotels, banks, restaurants, manufacturing establishments, etc., and for various institutions, such as churches and hospitals.

18. The work performed by the defendant, Sertner's, Inc., on goods belonging to furniture dealers, trade shops and interior decorators was at a better or cheaper price than that charged for work performed on goods belonging to the individual or private householder or home owner.

19. The total volume of business done by the defendant for each year from 1940 through 1943, together with a breakdown of the business done for each of those years by the defendant, as appears on Defendant's Exhibit K in evidence, is as follows:

1940—Total business done—$106,802.39

	No. of Customers	Percent of total Volume	Amount Billed	
1. Furniture Dealers	27	½ of 1%	$ 512.44	
2. Trade Shops	16	1/10 of 1%	647.63	
3. Decorators	135	8.4%	9,062.20	
4. Department stores	5	1/10 of 1%	655.25	
5. Commercial Consumers	94	6%	6,482.72	
6. Institutions (Churches etc.)	1	1/10 of 1%	114.45	$ 17,474.69
		16 1/10%		
Balance of annual volume, private residences		83 1/10%		$ 89,327.70

1941—Total business done—$117,577.39

	No. of Customers	Percent of total Volume	Amount Billed	
1. Furniture Dealers	27	9/10 of 1%	$ 720.76	
2. Trade Shops	16	9/10 of 1%	717.81	
3. Decorators	186	8.8%	10,395.77	
4. Department stores	6	3/10 of 1%	331.25	
5. Commercial Consumers	156	7 7/10%	8,571.58	
6. Institutions (Churches etc.)	5	1/6 of 1%	185.55	20,925.72
		17 1/3%		
Balance of annual volume, private residences		82 1/3%		$ 96,651.67

1942—Total business done—$121,218.42

	No. of Customers	Percent of total Volume	Amount Billed	
1. Furniture Dealers	32	1/2 of 1%	$ 543.46	
2. Trade Shops	17	3/4 of 1%	969.52	
3. Decorators	167	8%	9,727.64	
4. Department stores	6	3/8 of 1%	462.75	
5. Commercial Consumers	159	7 9/10%	9,271.41	
6. Institutions (Churches etc.)	7	1/3 of 1%	237.26	21,212.04
		17 9/10%		
Balance of annual volume, private residences		82 11/20%		$100,006.38

1943—Total business done—$158,614.08

	No. of Customers	Percent of total Volume	Amount Billed	
1. Furniture Dealers	34	⅛ of 1%	$ 1,168.99	
2. Trade Shops	28	⅓ of 1%	680.22	
3. Decorators	185	7%	11,545.26	
4. Department stores	7	⅓ of 1%	933.34	
5. Commercial Consumers	173	7.9%	12,557.44	
6. Institutions	9	1/10 of 1%	698.03	27,883.28
		17 3/5%		
Balance of annual volume, private residences		82 2/5%		$130,730.80

20. During the period of plaintiff's employment, approximately 2% of the goods and merchandise regularly and continuously processed and physically worked on by the defendant, Sertner's, Inc., belonged to and was shipped to customers outside of the State of New York.

21. The greatest part of the work done by the defendant was done for it by sub-contractors whom it employed for this purpose. On its own premises the deferdant only cleaned, renovated and repaired upholstered furniture. The actual cleaning and renovating of drapes, slipcovers, curtains, rugs and carpets was done by these various sub-contractors.

22. One of the principal divisions of the defendant's total business was the cleaning, renovating and processing of rugs.

23. The actual cleaning, renovating and processing of the rugs, however, was done not by this defendant but by a sub-contractor, the Lincoln Rug Co., located in East

Newark, New Jersey, whom said defendant employed for this purpose.

24. The trucks of the Lincoln Rug Co. used to call daily at the premises of this defendant to pick up the rugs for delivery to the plant of this sub-contractor in East Newark, New Jersey.

25. Also, the trucks of the Lincoln Rug Co. used to redeliver daily to this defendant the rugs which it physically cleaned, renovated and processed for it at its plant at East Newark, New Jersey.

26. Defendant's (*i.e.* Sertner's, Inc.) trucks did, on several occasions each day, bring into its premises truck loads of merchandise which it had picked up from the defendant's customers. Rugs to be cleaned, renovated and processed represented a substantial part of these truck loads of merchandise. Defendant's business with the Lincoln Rug Co. amounted to about $5600 a year.

27. Plaintiff would help unload the defendant's trucks and would physically handle and unwrap said rugs. Plaintiff would then make out job tickets for these rugs, would move them into their respective spaces, and would also make the appropriate entries in the defendant's records regarding the same. Plaintiff then physically prepared these rugs for shipment to the Lincoln Rug Co. and then would help load these rugs into the truck of the Lincoln Rug Co. and would otherwise physically work on and handle said rugs for the purpose of getting them out of the premises of the defendant and into the truck of said Lincoln Rug Co.

28. Plaintiff's physical activities in connection with the rugs which came into the premises of the defendant, Sertner's Inc., and which were then shipped and delivered to New Jersey for processing, renovating and cleaning con-

sumed, during the entire period of his employment herein, consumed several hours of his working time each day. A substantial portion of plaintiff's activities directly related to the movement of the aforementioned rugs in interstate commerce.

29. During the entire period at issue here there was carried on in the premises of the defendant, Sertner's Inc., as a regular and integrated part of the total activities of this defendant, the business of producing and bottling cleaning fluid for sale. This cleaning fluid was called Renofab Cleaning Fluid. In 1940, net sales of this cleaning fluid were in the amount of $1,059.19; in the year 1941 net sales were in the amount of $1,035.34 and for the years 1942, 1943 and 1944 net sales were in the approximate amount of $1,000.00 yearly.

30. Approximately 22% of the sales of the said cleaning fluid were in interstate commerce. The Renofab Cleaning Fluid was owned by a company known as Renofab Products Co., a co-partnership composed of the individual defendants in this action, Murray Sertner and Paul Serner.

31. The Renofab Products Co. never had a bank account, never possessed any books of account, never had any employees, never had any delivery service and had no separate place of business.

32. All the work done in connection with the bottling, producing, manufacturing, selling and shiping out of said Renofab Cleaning Fluid was done by employees of the defendant, Sertner's Inc., including the plaintiff. All the transactions of said Renofab Products Co. were recorded in the books of the defendant, Sertner's Inc., and by the employees of said defendant. The Renofab Cleaning Fluid was delivered by the trucks of Sertner's Inc.

33. There was no segregation or separation of the various types of activities carried on by the defendant, Sertner's Inc., during the period of plaintiff's employment herein. The employees of the defendant, including the plaintiff, performed duties and rendered services in connection with the retail and wholesale business of this defendant; in connection with the manufacture, production, bottling and sale of Renofab Cleaning Fluid; in connection with the services rendered and work performed by it for industrial, business and commercial users; in connection with the services performed and work rendered by the defendant, Sertner's Inc., on goods owned by interior decorators, furniture dealers and trade shops, and which was then resold by them in commerce to third parties; and in connection with work done for private and individual consumers as householders and home owners. The entire enterprise known as Sertner's Inc., encompassing all the different activities set forth in this finding, was consolidated and operated as one distinct and integrated business unit.

It is petitioner's contention that, based upon the foregoing facts, respondent was not a "retail or service establishment" within the exemption contained in Section 13 (a) (2) of the Act. It will be here demonstrated that the decision of the Circuit Court of Appeals, in this connection, can be supported neither by the legislative history of this section, nor by the official interpretation of the Wage and Hour Administrator which is entitled to great weight (*Roland Electric Co.* v. *Walling*, 326 U. S. 657, 676). It is further the contention of the petitioner that the decision below is inconsistent with decisions of other Circuit Courts of Appeal and, in certain respects, is also inconsistent with decisions of this court.

Reasons for Granting the Writ

1. This case presents an important Federal question which has not been, but should be, settled by this Court.

The principal question here involved, *i. e.*, whether a factory type industry or enterprise, such as respondent, doing a completely integrated retail and wholesale business, and also regularly engaged in producing goods for interstate commerce, is entitled to the exemption contained in Section 13(a)(2) of the Act, has not yet been decided by this court. There are many thousands upon thousands of wage earners throughout the country, employed in similar type of dry cleaning or laundry establishments, etc., whose rights under the Act are affected by the decision below. It is respectfully urged therefore that certiorari should be granted in order to review this question which is of such vital importance to these many employees and their employers.

2. The decision of the Circuit Court of Appeals in this case is, in certain respects, in conflict with the decision of this court in *Roland Electric Co.* v. *Walling*, 326 U. S. 657.

It is unquestioned that, as a regular and integral part of its total activities, respondent was continuously engaged in the producing and bottling of cleaning fluid for sale in interstate commerce (Findings 29, 33; R. 480-481, 37-38, 115-16, 169). Respondent was, by virtue thereof, foreclosed from urging that it was entitled to the exemption contained in Section 13(a)(2) of the Act. This court so held, in *Roland Electric Co.* v. *Walling*, with the terse observation that the "origin of this clause Sec. 13(a)(2), had nothing to do with establishments 'producing goods for [interstate] commerce' " (326 U. S. pp. 666-667).

Nor is the fact that this portion of its business represented but a small portion of its total business sufficient to deprive petitioner from the benefits of the above

decision or to afford immunity to respondent from the Act's provisions. It must not be overlooked that, despite the smallness of this busines, *it, nevertheless, was a regular, integral and continuous* part of the total business done (Findings 29, 33; R. 37-38, 115-116, 169, 480-481). It is the character rather than the size of the activity which is the controlling feature (*Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178; *Skidmore* v. *Casale*, 160 F. (2d) 527; *Davis et al.* v. *Goodman Lumber Co.*, 133 F. (2d) 52, 54).

3. The decision of the Circuit Court of Appeals in this case is inconsistent with decisions of other Circuit Courts of Appeals.

It is obvious that the wholesale activities of the respondent, employer, in processing goods belonging to furniture dealers, interior decorators and trade shops (who were charged better or lower prices than those charged to the ultimate consumer), and who then resold these goods to the ultimate consumer, were not the type of activities embraced within the exemption. Equally non-exempt were its activities in connection with the production of goods for interstate commerce (Findings 16-18). These non-exempt activities were not carried on in separate departments or by separate employees. Quite to the contrary there was here an indiscriminate commingling of exempt and non-exempt activities (Finding 33, R. 481).

Under such circumstances, the Sixth Circuit Court of Appeals recently held, in *Wabash Radio Corp.* v. *Walling*, 162 F. (2d) 391, 394:

> "Where exempt and non-exempt characteristics of the business are so intermingled as to be inseparable, the exemption is denied entirely*."

* Cf. *A. H. Phillips* v. *Walling*, 324 U. S. 490, 496: "The combined retail-wholesale nature of petitioner's interstate business would prevent it from properly being classified as a local 'retail establishment'."

The decision below also is in conflict with the decision of the Fourth Circuit Court of Appeals in *Guess* v. *Montague,* 140 F. (2d) 500, 503, wherein it was held that the retail or service establishment exemption in Section 13(a) (2) "does not extend to manufacturing or processing goods for sale" (140 Fed. (2d) 500, 503). "Nor, in such cases", the Court pointed out, "is the employer's business any the less within the coverage of the Act because some of his activities may include intrastate retail sales or servicing."

4. The legislative history of Section 13 (a) (2) clearly indicates that the court below was in error in extending the exemption to a large scale, factory type industry or enterprise such as conducted by respondent.

It is petitioner's contention that it was the intent of Congress to extend the exemption contained in Section 13 (a) (2) solely to small, local establishments doing a strictly retail business, on an over the counter, cash basis, with the individual ultimate consumer. The legislative history of this section amply demonstrates that a full-fledged, large scale, factory or industrial enterprise such as carried on by respondent was not intended to be embraced within this exemption.

Sec. 13 (a) (2) received the judicial scrutiny of this in *A. H. Phillips* v. *Walling,* 324 U. S. 490, wherein it was stated as follows:

> "From the standpoint of its legislative ancestry, Section 13 (a) (2) is the offspring of a manifest desire to exclude from the scope of the Act *'business in the several states that is of a purely local nature.'* Sen. Rep. 884, 75th Cong., 1st Sess., p. 5. *Congress was interested in exempting those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department*

store. It felt that retail concerns of this nature do not sufficiently influence the stream of interstate commerce to warrant imposing the wage and hour requirements of them. Ibid, p. 5. Section 13 (a) (2) is a part of the Act only because of the fear that Section 13 (a) (1), in exempting employees regularly engaged in a 'local retailing capacity,' did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. Walling v. Jacksonville Paper Co., 317 U. S. 564, 571." (Emphasis supplied.)

In further demonstrating that the exemption in question was intended to apply solely to the small local or corner retailer doing a "strictly retail" business on an over-the-counter cash basis, this court, in foot note No. 7 to the above case, stated as follows:

"The original language of Sec. 13 (a) (2), introduced as an amendment by Representative Celler, applied to any retail 'industry'. Representative Celler stated that if the amendment were accepted 'retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt.' Several other Congressmen expressed their desire to assure the exemption of 'the *corner* grocery store man or the filling station man' and 'the *local groceryman,* druggist, clothing store, meat dealer—any merchant in fact.' 83 Cong. Rec. 7299, 7436-7438. The exemption as it finally emerged from the joint House-Senate conference committee applied to any retail 'establishment' rather than 'industry'. *The use of the word 'establishment' is more appropriate to the small local retailers which Congress had in mind and clearly indicates that Congress meant by it something less or different than 'industry' or 'enterprise'.*" (Emphasis supplied.)

A mere cursory inspection of the pertinent and undisputed findings in this case, all based upon more than substantial evidence, amply substantiates the decision of the trial court that, in accordance with the above criteria, appellant was not entitled to a Sec. 13 (a) (2) exemption (Findings 3, 6, 7, 8, 9, 10, 11, 12, 12(a), 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, R. 472-481). Appellant was conducting not a retail service establishment, but a large full scale factory or industrial enterprise and, therefore, was not entitled to immunity from the Act's provisions.

5. The decision below is in conflict with the official interpretation of Section 13 (a) (2) by the Wage-Hour Administrator.

The Wage-Hour Administrator has formally issued an official bulletin interpreting Section 13 (a) (2) entitled "Interpretive Bulletin No. 6". Of course, such interpretive bulletins are persuasive and are entitled to great weight (*Overnight Motor Transp, Co.* v. *Missel,* 316 U. S. 572, foot note No. 17).

In paragraph 3 of Bulletin No. 6, the Wage-Hour Administrator preliminarily states as follows:

> "The courts have indicated that all exemptions in the act should be construed narrowly. *The person claiming an exemption must show affirmatively that his case falls both within the language and the statutory purpose.* Section 13 (a) (2), was intended to apply typically to the grocery store, butcher shop, haberdashery, clothing store, filling station, beauty parlor, hotel, and similar commonly recognized retail and service establishments. *Unless an establishment is clearly a retail or service establishment for purposes of section 13 (a) (2), an assumption that the exemption applies involves considerable risk of violation.*" (Emphasis supplied.)

Later on in the Bulletin the Administrator discusses, at great length, the type of establishment that could claim the benefits of a 13 (a) (2) exemption, and has set up various criteria, which, in all respects, should be possessed by such an establishment. Obviously, in view of the humanitarian purposes of the Act, and the strict construction of an exemption against an employer, the appellant should, if its plea be successful, bring itself squarely within the Administrator's definition. While, normally, departure from, or an inability to fully satisfy, any of the important tests laid down by the Administrator should suffice to invalidate a plea of exemption, it will soon be here amply demonstrated that this appellant has failed to meet many of these tests.

Thus, in paragraph 23 of Bulletin No. 6, the Wage-Hour Administrator has stated as follows:

> "Many of the characteristics outlined above with respect to retail establishments are helpful in determining whether a given establishment is a service establishment within the meaning of section 13 (a) (2). *Service establishments are usually local in character, are usually open to the general consuming public* and usually render a service to private individuals for direct consumption." (Emphasis supplied.)

At bar, appellant was obviously not the type of establishment delineated above (Findings 7, 8, 11, 12, 12(a), 15, 17-20, 29-33).

In paragraph 24 of Bulletin No. 6, the Administrator further states as follows:

> "Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants, cafeterias; roadside diners; hotels; tourist houses; trailer camps; home laundries; barber shops; beauty parlors; public baths; scalptreatment establishments; masseur establishments; funeral homes; embalming establishments;

crematories; establishments engaged in cleaning, dyeing, pressing, altering and repairing hats, clothing, and household goods for private individuals; valet shops; shoe repair shops; shoe-shine parlors; dress-suit rental establishments; public garages; automobile laundries; 'drive it yourself' establishments; battery shops; parking lots; musical instrument repair shops; piano tuning establishments; radio repair shops; watch, clock, and jewelry repair establishments; household refrigerator service and repair shops. These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise."

It is highly apparent from the foregoing that the service establishment, intended by Congress to be exempt from the Act, was, unlike the full-fledged industrial enterprise carried on by appellant, the corner or local retail merchant doing a strictly retail business, principally on a C.O.D. basis, directly with the general consuming public in the locality in which located, or from passersby in the street. Such a retail business would normally render all its services in small quantities, and on an over-the-counter basis, to private individuals rather than to industrial and business users. Clearly, appellant was not this type of establishment (Finding 3, 7-11, 15-20, 29-30).

In paragraph 9 of Bulletin No. 6, the Wage-Hour Administrator further states as follows:

"Although retail establishments are not uniform in appearance or manner of operation, they possess a number of common physical characteristics which serve as a helpful guide in determining whether a particular establishment is appropriately to be classified as a retail establishment for purposes of section 13

(a) (2). Ordinarily sales clerks are employed in the establishment to assist customers in making purchases rather than outside salesmen who solicit orders. Retail establishments usually have selling counters, cash registers to ring up sales, shelves for the display and convenient arrangement of merchandise, and display windows to attract the patronage of the general public. Retail establishments maintain a stock of merchandise on hand and normally make sales over the counter from such stock. They do not have manufacturing equipment or other machinery normally found in factories."

Appellant fails, in every respect, to meet the tests set forth in this paragraph of the bulletin. It employed no inside sales clerks, or any other person to wait on trade; the ultimate retail customer rarely, if ever, came into its premises, and, in direct contravention to the Administrator's test, a substantial portion of its employees were outside salesmen who solicited orders (Findings 7, 12 and 12(a)). Appellant possessed no selling counters, no cash registers to ring up sales, and had no display windows to attract the patronage of the general public. Furthermore, its premises were used as a full-fledged factory, containing various departments, with all sorts of mechanical equipment used in its operations. Also, unlike the typical or purely local service establishment, appellant was located on the twelfth floor of a loft building, in a strictly loft building neighborhood, and, thus, was not in a position to, nor did it attempt to, directly attract the patronage of the general consuming public (Findings 3, 6, 7-9, 11, 12, 12(a), 13-14; R. 472-475).

In paragraph 25 of Bulletin No. 6, the Administrator further states:

"Another example of an establishment which would not be a service establishment * * * is an industrial

> laundry or linen supply company which cleans or supplies coats, covers, towels, sheets, etc., for railroads, hotels, restaurants, beauty parlors, barber shops, stores, hospitals, and other industrial or business customers. Such an industrial laundry or linen supply company, unlike the home laundry which serves private individuals, does not stand in a position similar to that occupied by the retailer."

At bar, appellant regularly and continuously worked on and processed goods in large quantities, and had many transactions in large amounts with various industrial business and institutional users (*i. e.*, not with private householder) such as hotels, banks, churches, restaurants, etc. For this reason also, appellant cannot claim the benefits of the exemption contained in Section 13 (a) (2) (Findings 16-19).*

Furthermore, the Administrator has correctly urged that a producer of goods for interstate commerce cannot, under any circumstance claim a Section 13(a)(2) exemption. Thus, in paragraph 17 of Bulletin No. 6, he states as follows:

> "On the other hand, an establishment which is engaged in manufacturing operations is not a retail establishment even though the goods which it manufactures are distributed at retail."

Finally, in discussing an enterprise which, as here, is engaged in doing a combined or integrated retail and non-

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* Cf., to same effect, paragraph 27 of Bulletin No. 6, wherein the Wage-Hour Administrator states as follows: "As already indicated, establishments which perform a substantial amount of work for industrial or business users, government agencies, institutions, and similar customers may not be considered service establishments. A service establishment is one which performs service for private individuals for person or family use."

retail business, the Administrator concludes, in paragraph 41 of his bulletin, as follows:

> "If the entire enterprise is consolidated and operated as a distinct or integrated business unit; if there is no physical separation whatever between the retail and non-retail branches of the business; then the exemption does not apply. The enterprise would have to be treated as a whole and, as such, could not properly be described as a retail establishment."

The court below, while recognizing the existence here of many of the conditions which the Administrator has stated would preclude an employer from being properly classified as a retail establishment within the exemption (R. 497-498), has, nevertheless, seized upon paragraphs 13 and 28 of Interpretive Bulletin No. 6 as justification for its judgment of reversal.

As one of the many conditions prescribed for determining the applicability of the exemption, the Administrator has stated in those two paragraphs that where more than 75% of an employer's income is derived from retail sales, such fact might lay the ground for a 13 (a) (2) exemption. But it is important to note that this 75% test was promulgated solely in connection with an employer whose total business, unlike here, consisted solely and exclusively in selling or rendering services directly to the ultimate consumer, but where some of the direct ultimate consumers were business or commercial firms, or institutions, such as hotels, restaurants, banks, department stores, etc., as distinguished from private householders.

The Administrator, however, has never issued such a test with respect to a completely integrated wholesale-retail business such as was carried on by petitioner, nor with respect to an establishment also engaged, as a regular and continuous part of its integrated activities, in producing goods for interstate commerce.

Obviously, also, the test was never intended to be all exclusive. Interpretive Bulletin No. 6 is a lengthy document of 23 pages, replete with many tests for determining the applicability of Sec. 13 (a) (2). If the 75% test was intended to be the sole and exclusive grounds for granting or denying the exemption, the interpretive bulletin should then have contained, perhaps, just two paragraphs. Why, therefore, should the Administrator have taken the pains, in his bulletin, to discuss at great length so many other grounds or conditions, the existence of which, in his opinion, would preclude an employer from being properly classified a retail establishment under Sec. 13 (a) (2)? Surely he never intended that the exemption should be automatically granted solely upon a showing of the 75% test prescribed in paragraphs 18 and 28, even if there were present (as at bar) so many of the other conditions which he, in the bulletin, believes to be grounds for rejecting a plea to immunity under this section.

6. The court below unjustifiably gave respondent the benefits of an unusually broad interpretation of Section 13(a) (2) despite this court's admonition to the contrary in *A. H. Phillips Co., Inc.* v. *Walling*, 329 U. S. 490.

Because of the profound public policy with which the Act is affected, because of the great evils sought to be thereby eradicated, and because of the Act's broad humanitarian purposes, all exemptions in the Act must be narrowly and strictly construed. (*Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Bowie* v. *Gonzalez*, 117 F. 2d 11.)

Furthermore, an employer seeking recourse to an exemption under this Act must unmistakably sustain the burden of proof with regard to every material fact upon which the right to exemption must depend. [*Miller Hatcheries* v. *Boyer*, 131 F. 2d 283 (C. C. A. 8, 1942); *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. 2d 567 (C. C. A. 3, 1941);

Helena Glendale Co. v. *Walling,* 132 F. 2d 616 (C. C. A. 8, 1942); *Ralph Knight, Inc.* v. *Mantel,* 135 F. 2d 320 (C. C. A. 8, 1943); *Calaf* v. *Gonzalez,* 127 F. 2d 934 (C. C. A. 1, 1942); *Walling* v. *Reid,* 139 F. 2d 323 (C. C. A. 8, 1943); *Schmidtke* v. *Gonesa,* 141 F. 2d 634 (C. C. A. 1, 1944)].

In commenting on the very exemption here involved, this court, in *A. H. Phillips Co.* v. *Walling,* 329 U. S. 490, aptly stated as follows:

> "The Fair Labor Standards Act was designated 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work'. (Message of the President to Congress, May 24, 1934.) *Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.*" (Emphasis supplied.)

Despite the foregoing, petitioner respectfully submits that the court below unjustifiedly gave respondent the benefits of an unusually broad interpretation of Sec. 13 (a) (2)

(a) By holding that the nature and character of an employer's business operations, together with its physical set-up, was of no relevancy under this exemption (R. 496-499),

(b) By considering as equally irrelevant the undisputed fact that respondent was actually conducting and operating a large scale, full fledged factory and industrial enterprise,

(c) By adopting the 75% test of the Administrator in paragraphs 18 and 28 of Interpretive Bulletin No.

6 as the all exclusive test for determining the applicability of the exemption, despite the existence of many other circumstances and conditions set forth by him in other portions of his bulletin as grounds for rejecting a claim to the exemption,

(d) When, in aplying the 75% test, it treated as strictly retail sales the business procured by interior decorators who were paid commissions therefor. (Such business represented one-third of the total business done by respondent—Finding 11, R. 474, 500.)

Surely, there was here sufficient doubt that the factory or industrial enterprise conducted by respondent, doing business with customers in three states (Finding 15, R. 475), was the "small, local retailer which Congress had in mind" (*A. H. Phillips Co.* v. *Walling*, 329 U. S. 490) in this section. Surely, also, this is not a case where an employer should be entitled to the exemption because it has unmistakably sustained the burden of proof with regard to every material fact upon which its right to the exemption depends.

CONCLUSION

The writ of certiorari should be granted.

Dated: New York, May 10, 1948.

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